No. 14,850

In the

United States Court of Appeals

For the Ninth Circuit

LEO STURDIVANT, et al.,

Appellants,

vs.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, an Arizona Corporation,

Appellee.

Appellants' Reply Brief

Appeal from the United States District Court
for the District of Arizona

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There are several evidentiary inaccuracies contained in the brief of Appellee which should be considered by the Court.

I.

The brief states (pp. 3-4) that the Trial Court found the Appellants were not employed to work 24 hours a day 7 days a week. This is only found by inference in the Judgment of the Court, to-wit,

> "* * * the time credits agreed upon and as set forth in Appendix 'A' bear a substantially acurate relationship

to the actual time required by Plaintiffs to perform all the work required of them in that Plaintiffs were not required to work in excess of said agreed credits to perform all the work required." (TR 40-41)

Despite Appellants' contentions this finding is clearly erroneous in that there is no evidence to support it in the transcript. The only evidence in the transcript is to the contrary, that is, that the time credits were artificial and bore no relationship to the actual time worked, and this was testified to at numerous times (See: TR 189, 201, 274, 436, 469, 569, 596).

So artificial was this time unit system that one of the witnesses for the Appellants testified that he was "docked" 11 and 9/10ths hours for working over 24 hours a day (TR 203). As a matter of fact the company's attorney phrased it correctly:

"Q. As a matter of fact there are only certain operations for which you were given actual time?" (TR 244)

Even the company witnesses nowhere state that the time units bore a substantially accurate relationship to all the work done or the actual work done. The closest to it was Frank Richard Hill's testimony,

"A. All things being equal, if the water was there, the only way you could change a head of water if the water would be there, if the water was in the lateral and the zanjero knew his business as a regular zanjero, I believe that the time was adequate." (TR 340)

Later on, the same witness answered the question:

"Q. Mr. Hill, how long did it take to make a lateral change?

A. Well, it all would depend on how much water you were picking up. * * * " (TR 367)

The Court consistently ruled out evidence with respect to this matter (See TR 201, 473, 474, 200, 468).

The Court further finds

> "The work performed by plaintiffs for which they were compensated as hereinabove found constituted all the work performed by Plaintiffs for Defendants." (TR 41).

This is clearly erroneous in that again there is no evidence to support this finding. The Opening Brief of Appellants discusses this matter in detail (TR 20-27). It is interesting that during the long pre-trial maneuvers and during the actual trial the Trial Court repeatedly refused to consider the time units and to consider the contention of the Appellants that the time units were inaccurate and artificial. The Judge's ruling on this matter apparently at the time of the trial was that the plaintiffs are bound by a contract and that that ends the matter.

Appellee states in its Brief (page 31) that the weight of the evidence tends to show that as a matter of practice the zanjero performs his work during the day-light hours most days of the year and quotes certain witnesses. The witnesses whose evidence was cited were witnesses for the Appellee with two exceptions.

Thus Appellee John W. Smith was present during 2 days of the trial. However, it could be pointed out that this is not during the period of time covered by this action (See, TR 594). In the matter of the other company witnesses, a very small and incomplete portion of their testimony is cited; thus James Patterson, a supervisor, called by Appellants, testified:

> "Q. It is the policy of the company that the zanjero do most of his field work during the daytime?
>
> A. No; * * *" (TR 124)

"Q. In the summertime, let's say, in the month of May or June, do you know how many hours about on the average, a zanjero would have to spend out in the field?

A. Well, each division is a little different. I have one fellow that has been busy for 2 or 3 days during the week. I mean by that he will pick up his water at midnight. He is in a congested area and he will run, then, for 3 or 4 days when he gets his board completed. Then he will have some free time." (TR 122)

"Q. Do you know or are you familiar with the policy of the phone company with respect to phone calls coming in at night as to whether the zanjero should or should not answer them?

A. Well, the zanjero is subject to call 24 hours a day and it is my supposition that naturally when it rings he should answer it." (TR 123)

Frank Hill did admit that he did some of the many changes noted in his field book at nights, but that contrary to the rules of the company, he also permitted farmers to make their own changes at night.

"Some of those changes I made at night, a lot of them were shut off by farmers and a lot of them I was running waste water coming from the desert and they would put down the gate, the farmer would." (TR 816)

John Ruth's testimony was completely impeached in the closing pages of the transcript. As a matter of fact, Mr. Ruth was directly examined by the counsel for appellee concerning his testimony about not working at night.

"Q. Did you ever receive any complaints from the Water Users with respect to the manner in which you are operating your Division?

A. I did.

Q. You did?

A. Yes, sir." (TR 828)

One of the Appellants testifying with respect to the Division operated by Mr. Hill, and after stating that he had operated the Division between 4 and 6 weeks, stated:

> "Q. Were you able to finish your work during the daylight hours of that division?
>
> A. No, sir. We got quite a bit of our water late at night * * *" (TR 444)

A careful reading of the testimony of the witnesses reveals certain astonishing matters; thus Ida Phillips testified in support of Appellee's position:

> "Q. How many hours would your husband work on that day, do you know?
>
> A. Well, he was busy nearly all the time on that.
>
> Q. What do you mean by all the time—16 hours a day?
>
> A. Oh, no; not that much; at least 12.
>
> Q. When would he start and when would he stop?
>
> A. Oh, well, I was just counting the actual time he put in on the job. He got up in the morning about 5:30 and he sometimes didn't get to bed until about 10:00 on that Division." (TR 392-393).

Ezra L. Vines and E. L. Wilson also gave similar testimony (TR 403, 410, 416). As a matter of fact Wilson admits that the Association operated 24 hours a day, 7 days a week and that the zanjeros were responsible for their division 24 hours a day.

In short, the transcript shows that the Appellee's defense was that the Appellants signed and were bound by a collective bargaining contract, regardless of whether or not the contract provided them with compensation for all hours worked or all work done. Appellee offered no evidence to show that the time unit system was arrived at by any actual time study. Appellants' efforts failed to elicit any evidence

as to what the basis of the time unit system was, and there was no evidence supplied by Appellee which shows that the time unit system represented actual time worked in any case.

Therefore, the only testimony in the record is that which proved the artificiality and inaccuracy of the time unit system.

The lower court tried this case on the theory that all evidence indicating that the time unit system did not cover actual hours worked was immaterial and such testimony as may be in the record on the subject was brought out by indirection.

The lower court made the finding of fact that there was substantial relationship between the pay plan and hours worked despite the fact that there was no evidence supporting this finding and despite the fact that it time and again refused to permit the Appellants to introduce evidence on this subject.

II.

With respect to the issue of liquidated damages and good faith, Appellee indulged in an astounding effort to complete a record which is devoid of evidence of good faith. The two letters which are appended to Appellee's brief were never introduced into evidence, never submitted to cross examination and counsel for Appellants were completely unaware of them until the "post trial" brief was submitted by Appellee. It might be pointed out that the letters themselves constitute an admission that Appellee was subject to the Fair Labor Standards Act until January 25, 1950. Indeed in view of the previous decision of this Court in the matter of *Reynolds v. Salt River Valley Water Users,* Civ. 9, 1954, 143 Fed. 2d 863, it can hardly do otherwise.

And the letter of counsel for Appellee to the general manager of Appellee, which is submitted in the Appellee's brief, despite stating that they believe that the situation might be possibly exempt, does state that the Act should be complied with.

In addition to the attempt of counsel to introduce into evidence letters which do not appear in the record, counsel cites numerous cases where the Courts did not award liquidated damages because of the advice of counsel. Actually this Court upheld a trial court in such a decision (See, *General Electric Company v. Porter,* 9 Cir., 1953, 208 F.2d 805). However, the Court should observe that in that case the attorneys for the company established in the evidence that a diligent, careful and prolonged research was made of the problem. There is in the actual evidence in this case nothing to so indicate. This case seems to be identical with *Rothman v. Publicker Industries, Inc.,* 3 Cir., 1953, 201 Fed. 2d 618, where the Court said:

> "The Appellant did not even attempt to meet that burden. Certainly in a case where an employer predicated a change in overtime compensation rates upon so small a change in job description as was the case here, it was not incumbent upon the Court to seek out some exculpatory rationalization of the employer's conduct."

Since the evidence clearly indicates that the company at all times used a misleading title for its pay sheets involving the Belo Plan it would seem almost impossible to construct or infer any action of the company to show good faith (TR 509).

It is respectfully submitted that the Judgment in the Lower Court should be reversed as prayed for in appellant's opening brief.

Respectfully submitted,

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